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SUPREME COURT, U.S.

No. 05-5992

In The
Supreme Court of the United States

JACOB ZEDNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner's opening brief demonstrated that (1) the requirements of the Speedy Trial Act ["Act" or "STA"] may be waived only in the narrow circumstances the Act specifies (Pet. Br. 18-33); and, (2) a violation of the Act's 70-day time limit is not subject to harmless-error analysis (*id.* 33-43). By endorsing these two bright-line rules, the Court will end the confusion that has plagued the lower courts, and ensure that prosecutors and judges understand their duty to comply with the Act's time limits.

The Government's brief is notable more for what it concedes than what it disputes. With respect to the waiver question, the Government agrees that "defendants cannot unilaterally waive the requirements of the STA" without "judicial * * * approval based on findings that the ends of justice outweigh speedy trial interests." Brief for the United States ("Gov. Br.") 16-17. The Government also concedes that the district court did not exclude the 90-day delay between January and May 1997 in accordance with the Act's "ends of justice" procedures. *Id.* 14, 18. Accordingly, because this delay exceeded the Act's 70-day limit, the indictment must be dismissed.

The Government, however, argues that, though speedy trial waivers are unenforceable, the doctrine of judicial estoppel bars petitioner from challenging this improper 90-day delay. *Id.* 14-29. But judicial estoppel does not preclude a party who signs a waiver from later arguing that it is void as against public policy. That is all petitioner did here, hardly the "extreme conduct" imagined by the Government. *Id.* 23. Moreover, petitioner's waiver was not an effort to play "fast and loose" with the court. Petitioner and his original counsel simply labored under the mistaken legal view, encouraged by the court and the prosecutor, that speedy trial waivers were valid. The doctrine of judicial estoppel does not apply to such good-faith mistakes of law. Accordingly, this Court should hold

that the purported waivers relied upon by the lower courts were invalid and remand for dismissal of the indictment.

The Government's harmless-error arguments are no more persuasive. The Government does not claim that a violation of the Act's 70-day time limit is subject to harmless-error analysis. It argues, however, that the district court's unexplained 195-day delay in deciding petitioner's competency did not exceed the Act's 70-day limit. The Government contends that this delay was automatically excluded as a "delay resulting from the fact that the defendant is mentally incompetent* * * *" 18 U.S.C. § 3161(h)(4). This is sophistry. This delay did not "result from" the "fact" of Zedner's incompetency; it resulted from the court's failure to decide the competency issue promptly. Under the Government's view, a court could sit on a competency proceeding indefinitely without violating the Act, so long as it eventually finds the defendant incompetent. This makes no sense as a matter of statutory construction and would authorize indefinite delays for defendants whose competency is in question.

In short, the Act was violated by the court's failure to decide petitioner's competency until 195 days after the issue was taken under advisement. Because that violation cannot be harmless, the Court should remand for dismissal of the indictment.

ARGUMENT

I. The Government's reliance on the doctrine of judicial estoppel is untimely and misplaced.

The Government agrees that petitioner's purported waiver of the STA was ineffective to toll the 90-day delay from January 31 to May 2, 1997. Gov. Br. 17-18. The Government also concedes that the court did not properly exclude this delay from the STA clock. *Id.* 17, 20-21. Nevertheless, the Government contends that judicial estoppel bars petitioner from challenging this delay

because his waiver supposedly induced the court not to make ends-of-justice findings that it otherwise "could and almost certainly would have made." *Id.* 18.

The Government's estoppel argument fails. First, the Government forfeited the argument by not raising it until now. Second, judicial estoppel does not bar a party from challenging a waiver that is void as against public policy. Third, assuming judicial estoppel applies in criminal cases, none of the doctrine's elements are met here. Finally, the Government engaged in its own misconduct by asserting contradictory positions regarding petitioner's mental illness. The Government's unclean hands preclude it from invoking the equitable doctrine of judicial estoppel.

A. The Government forfeited its judicial estoppel argument by never raising it in the lower courts.

The Government forfeited its judicial estoppel argument by not raising it in either the district court or the court of appeals. *See United States v. McCaskey*, 9 F.3d 368, 378-79 (5th Cir. 1993) (judicial estoppel must be raised in district court); *U.S. ex rel. Am. Bank v. C.I.T. Constr. Inc.*, 944 F.2d 253, 258 (5th Cir. 1991) (same); 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4477, at 555 (2d ed. 2002) ["Wright & Miller"] ("judicial estoppel will likely come to be treated as an affirmative defense, waived by failure to plead, just as res judicata is an affirmative defense").[1]

[1] At no point below did the Government invoke the doctrine of judicial estoppel. The Government argued in the district court that the waiver "for all time" was valid and made "further orders of excludable delay unnecessary." J.A. 150. It assured the court that "we will be okay in the Court of Appeals based upon your Honor's waiver for all time." J.A. 176. On appeal, the Government argued that the waiver was

(Continued on following page)

While a court may, in exceptional circumstances, overlook the failure to raise judicial estoppel promptly, the Court should not do so here. On the contrary, considering the issue for the first time now would be unfair to petitioner. By not raising judicial estoppel below, the Government denied petitioner the opportunity to demonstrate that his alleged shift in position was not a manipulative effort to play "fast and loose" with the judicial system. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 807 (1999) (party should be afforded meaningful opportunity to explain changed position). Accordingly, this Court should not consider the Government's eleventh-hour assertion of the doctrine.

B. The doctrine of judicial estoppel does not preclude a party from challenging an unenforceable waiver.

The Government's reliance on judicial estoppel is also misplaced. The Government argues that petitioner is estopped from challenging the delay from January to May 1997 because he agreed to waive his speedy trial rights, and the court allegedly relied upon that waiver in failing to make the requisite "ends of justice" findings. Gov. Br. 14, 18-29.

The Government is wrong. Principles of estoppel do not prevent a party from arguing that a waiver or other agreement is void as against public policy. As this Court noted long ago, "'if public policy prohibit[s] * * * a bargain in advance, it would seem that a court should be astute not to give effect to such illegal contract by indirection, as by spelling out a waiver or estoppel.'" *Glavey v. United States*, 182 U.S. 595, 609 (1901) (quoting *Miller v. United*

"effective" to exclude the delay from January to May 1997. Brief for the United States 22, *United States v. Zedner*, 401 F.3d 36 (2d Cir. 2005) (No. 04-0821).

States, 103 F. 413, 415 (C.C.S.D.N.Y. 1990)); *see also In re Dow Corning Corp.*, 419 F.3d 543, 554 (6th Cir. 2005) ("[O]ne cannot be estopped from arguing that a contract term is illegal for public policy reasons."); *Norton v. McOsker*, 407 F.3d 501, 506 (1st Cir. 2005) ("[T]he doctrine of estoppel * * * has no application to a contract * * * which is void because it violates * * * public policy.") (internal quotation omitted). In the words of one court:

> [T]he doctrine of estoppel by conduct * * * has no application to a contract or instrument which is void because it violates an express mandate of the law or the dictates of public policy. Such a contract has no existence whatever. It has no legal entity for any purpose, and neither action nor inaction of a party to it can validate it; and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity.

Doherty v. Bartlett, 81 F.2d 920, 924 (1st Cir. 1936).

Accordingly, there were no "abuses of the judicial system" here, as the Government pretends. Gov. Br. 26. Petitioner simply sought to enforce the Act by arguing that the purported waivers invited by the district court were ineffective to suspend the Act.

Accepting the Government's estoppel argument would swallow the rule against speedy trial waivers. Although the waiver was ineffective, petitioner would be bound to that waiver by virtue of judicial estoppel. Such a result would effectively render the waiver enforceable, in violation of the strong congressional policy against speedy trial waivers. *See* Pet. Br. 19-29.

C. The doctrine of judicial estoppel does not apply to the facts of this case.

The requirements of judicial estoppel are not met here. Three factors "typically inform the decision whether

to apply the doctrine in a particular case": 1) "a party's later position must be 'clearly inconsistent' with its earlier position"; 2) "the party has succeeded in persuading a court to accept that party's earlier position"; and 3) "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). The doctrine should not apply "'when a party's prior position was based on inadvertence or mistake.'" *Id.* at 753 (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995)). The Court has also recognized that "broad interests of public policy may make it important to allow a change in positions that might seem inappropriate as a matter of merely private interests." *New Hampshire*, 532 U.S. at 755 (internal quotation omitted).

1. Petitioner did not adopt clearly inconsistent positions, but only sought to correct a mutual mistake of law.

Petitioner did not pursue contradictory positions. To be sure, his original lawyer assumed that petitioner's rights under the Act could be waived and agreed to waive them. But he never advanced the "position" that the waiver was valid. On the contrary, it was the court that took that position, and petitioner simply accepted it as correct.

In any event, even if there were a clear contradiction, the first position was based on a mutual mistake of law. Everyone – the court, the prosecutor, and petitioner's original lawyer – all proceeded in the good-faith but erroneous belief that speedy trial waivers were valid. Legal errors of this sort do not give rise to judicial estoppel. *See New Hampshire*, 532 U.S. at 753; *Johnson Serv. Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 175 (5th Cir. 1973) ("Because the rule [of judicial estoppel] looks toward cold manipulation and not an unthinking or confused blunder,

it has never been applied where plaintiff's assertions were based on * * * inadvertence[ ] or mistake.").

Further, any inconsistency concerned a pure question of law – *i.e.*, whether the Act could be waived – not contradictory assertions of fact that can trigger estoppel. *See* Wright & Miller, § 4477, at 595 ("It is difficult to imagine circumstances that would justify an invocation of judicial estoppel to preclude inconsistent positions as to a matter of pure law* * * *"); *Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005) ("[T]he position to be estopped must generally be one of fact rather than law or legal theory.") (citation omitted); *1000 Friends of Maryland v. Browner*, 265 F.3d 216, 226-27 (4th Cir. 2001) (refusing to apply judicial estoppel to question of law).

2. Petitioner did not convince the district court that speedy trial waivers were valid.

Petitioner also did not "persuad[e]" the district court that the requirements of the Act could be waived. *New Hampshire*, 532 U.S. at 750. On the contrary, the court persuaded *him* that this was the case. The court assured petitioner and his counsel, incorrectly, that speedy trial waivers "for all time" were valid and that "nobody has yet challenged [this position] who has read the Speedy Trial Act* * * *" J.A. 73; *see* Pet. Br. 5-6.

The trial judge adopted this legal position in 1978, almost 20 years before this case began. *See* Thomas C. Platt, *The Speedy Trial Act of 1974: A Critical Commentary*, 44 Brook. L. Rev. 757, 773 (1978) (rejecting view that "a defendant's consent or waiver of his rights cannot constitute a sufficient basis for an extension of the statutory time limits* * * *"). The court has adhered to this position and has solicited speedy trial waivers routinely, as evidenced by the pre-printed form he had petitioner sign. J.A. 79; *see also United States v. Beech-Nut Nutrition Corp.*, 677 F. Supp. 117, 120 (E.D.N.Y. 1987) (accepting

defendants' agreement to "formally waive the Speedy Trial Act," and purporting to "suspend all other provisions of the Act* * * *").

Under these circumstances, the court's reliance on a waiver, encouraged by the prosecutor, *see* J.A. 81, 150, cannot be blamed on petitioner. Accordingly, judicial estoppel does not apply.

3. Estoppel is not necessary to prevent unfair advantage.

The Government repeatedly asserts that, absent the waiver, the court "could have and almost certainly would have" made a finding that the need for the delay from January to May 1997 outweighed the public's interest in a speedy trial. Gov. Br. 14, 18, 26. Nothing in the record supports this speculation.

On November 8, 1996, when petitioner's first lawyer sought an adjournment until January 31, 1997, the court refused to grant the request without a "complete waiver" because of its busy docket. J.A. 71. This strongly suggests that, absent the waiver, the delay would not have been granted.

Similarly, on January 31, 1997, the court was deeply skeptical that defense counsel's professed need for additional delay – to investigate whether the "Onited States" bond was real – warranted another three-month adjournment. It was only the waiver that led the court to indulge counsel's request for additional time.[2] Absent the waiver, it is likely the court would not have found that the need for delay outweighed the public's interest in speed. Accordingly, the Government's position fails.

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[2] The Government was not pushing for a prompt trial either. It did not "report[ ] ready for trial" on January 31, 1997, as claimed (Gov. Br. 5), but simply sought a trial "sometime in 1997." J.A. 81.

4. The Government's own misconduct counsels against a finding of judicial estoppel.

As the Government concedes, judicial estoppel is an equitable doctrine, invoked at the Court's discretion. Gov. Br. 16. Accordingly, in weighing the equities, it is appropriate to consider the Government's own misconduct. *See, e.g.*, *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 243 (1933) (party invoking equity "must come into court with clean hands").

The Government's misconduct was egregious. It secured petitioner's conviction by convincing the jury of a factual proposition that contradicts both the medical evidence and the Government's own pre-trial position. In successfully opposing petitioner's request for a trial in August 2000, the prosecutor convinced both the district court and later the court of appeals that petitioner was mentally incompetent because he suffered from delusions. J.A. 90, 100-10. At trial, however, the same prosecutor argued the opposite, convincing the jury, contrary to the report of the Government's own doctors, that petitioner was "not at all delusional" (Trial Tr. 361), that his mental illness was an act, and that he had "fooled the doctors." Trial Tr. 400. Had the Government told the jury what it had successfully convinced the court before trial – that petitioner was genuinely mentally ill – he might well have been acquitted.

This about-face poses a far greater threat to the justice system than petitioner's challenge to the invalid speedy trial waiver "for all time." Accordingly, the Government should not benefit from the equitable doctrine of judicial estoppel.

D. The Act does not authorize a remand for "ends of justice" findings nine years after the continuance was granted.

The Government argues that, even if estoppel does not apply, the mandatory remedy of dismissal is unwarranted. Instead, it seeks a remand for the district court to consider, nine years after the fact, whether to make a *nunc pro tunc* "ends of justice" finding to exclude the 90-day delay in 1997. Gov. Br. 30-31. While conceding that the court did not make any such finding before granting the continuance, the Government nonetheless suggests that the district court "engaged in the appropriate ends-of-justice balancing" (*id.* 30), and should be allowed to make the requisite finding now. The Government's proposed remedy is based on a flawed premise and contradicts the clear language of the Act.

The Act requires a judge to determine – prior to granting a continuance – that the ends of justice served by the delay outweigh the best interest of the public and the defendant in a speedy trial. *See* 18 U.S.C. § 3161(h)(8)(A) (continuance must be granted "on the basis of" ends-of-justice finding); *see also United States v. Tunnessen*, 763 F.2d 74, 77 (2d Cir. 1985) (judge must make finding "'before granting the continuance'") (quoting S. Rep. No. 1021, at 39, 93d Cong., 2d Sess. (1974)); *United States v. Frey*, 735 F.2d 350, 352 (9th Cir. 1984) ("district court erred by making *nunc pro tunc* findings to accommodate its unwitting violation of the Act"); *United States v. Brooks*, 697 F.2d 517, 522 (3d Cir. 1982) ("[A] judge could not grant an 'ends of justice' continuance *nunc pro tunc*, providing the after the fact justification for the unauthorized delays."). The requisite finding must be supported by reasons, set forth "orally or in writing," section 3161(h)(8)(A), upon consideration of the specific factors in section 3161(h)(8)(B). If the finding was not made, the delay is not "excludable." 18 U.S.C. § 3161(h)(8)(A). Accordingly, as no finding was made for the 90-day period here, the indictment must be dismissed. 18 U.S.C. § 3162(a)(2).

The Government is wrong, as a factual matter, in contending that the court "engaged in the appropriate ends-of-justice balancing." Gov. Br. 30. The court, having suspended the Act via the waiver "for all time," never considered, cited, or "balanced" the "ends of justice," the "public interest," or counsel's "due diligence." 18 U.S.C. § 3161(h)(8)(A) & (B). And even after petitioner moved for dismissal in 2001 on the ground that the Act had been violated, neither the Government nor the court ever claimed that the court had made the requisite finding (or engaged in the necessary "balancing") prior to granting the 90-day continuance. J.A. 128-29 (relying on waiver).

In short, the district court failed to make the necessary statutory finding. It is too late for that finding to be made now. *See United States v. Janik*, 723 F.2d 537, 544-45 (7th Cir. 1983) ("If the judge gives no indication that a continuance was granted upon a balancing of the factors specified by the Speedy Trial Act until asked to dismiss the indictment * * * , the danger is great that every continuance will be converted retroactively into a continuance creating excludable time, which is clearly not the intent of the Act.").

* * *

In sum, principles of waiver and estoppel cannot excuse the court's failure to exclude the 90-day delay in 1997 from the STA clock. Accordingly, the indictment must be dismissed.

II. The Speedy Trial Act's 70-day time limit is not subject to harmless-error analysis and was exceeded in this case.

The Government concedes that an indictment must be dismissed under the STA if the unexcused pre-trial delay exceeds 70 days. Gov. Br. 2-3. The Government also concedes that the district court did not resolve the competency proceeding for more than 195 days after it was taken

under advisement, despite the statutory command that such decisions be made in 30 days. *Id.* 6-7, 32-33; *see* 18 U.S.C. § 3161(h)(1)(J); *Henderson v. United States*, 476 U.S. 321, 328-29 (1986).[3] The Government further agrees that defense counsel's pregnancy during part of this period did not excuse the delay. Gov. Br. 32 n.9. Lastly, the Government does not seriously dispute that a violation of the Act's 70-day time limit is not subject to harmless-error analysis, the second issue on which this Court granted certiorari. *Id.* 36-38, 40 nn.12-13. Because the Government appears to agree that such an error cannot be considered harmless, petitioner will not belabor that point, but instead will rest on his argument in the opening brief. Pet. Br. 16-18, 33-43.

If this Court agrees with the Government's concessions, it would be appropriate to rule, as requested in petitioner's opening brief, that harmless-error analysis does not apply to STA violations and to remand for a determination of whether the Act's 70-day limit was exceeded based upon the delay from August 23, 2000 to March 6, 2001. Pet. Br. 44.

The Government advances, however, a new claim that it did not raise below and upon which this Court has not granted review. The Government contends that the district court's unexplained delay in deciding the competency proceeding was not error because the court eventually decided, after the delay, that petitioner was incompetent. Thus, the Government contends, the delay was not attributable to the court's tardiness in deciding the motion, but instead was, retroactively, a delay "resulting from the fact that the defendant is mentally incompetent* * * *" 18 U.S.C. § 3161(h)(4); Gov. Br. 11-12, 31-34. Because the STA

[3] The 30-day limit can be extended if the court properly enters an "ends of justice" exclusion. 18 U.S.C. § 3161(h)(8). The court made no exclusion here.

does not exclude competency proceedings from the unambiguous requirement of section 3161(h)(1)(J) that "any proceeding" be decided within 30 days of being taken under advisement, this argument should be rejected. Therefore, if the Court decides to reach this issue and resolves both it and the harmless-error issue in petitioner's favor, the appropriate remedy is to remand with instructions to dismiss the indictment with or without prejudice.

A. The Government's reading of the Act is untenable.

The case against every indicted defendant necessarily proceeds under a presumption of mental competence because due process prohibits the criminal prosecution of a defendant who is not competent to stand trial. *See Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996); *Medina v. California*, 505 U.S. 437, 439 (1992). In the federal system, once a defendant's competence is in doubt, proceedings, which often include a hearing, are held under 18 U.S.C. § 4241. The issue for the court to decide is whether the defendant "is presently suffering from a mental disease or defect rendering him mentally incompetent* * * *" 18 U.S.C. § 4241(d). If the court rules that the defendant is incompetent, then, starting at that point, the defendant loses certain rights until he regains competency. Principally, the court must commit him to the custody of the Attorney General, "who shall hospitalize the defendant for treatment in a suitable facility* * * *" *Ibid.* The case may not proceed further until the defendant is restored to competency. 18 U.S.C. § 4241(d) & (e).

The STA includes a comprehensive structure for dealing with delays "resulting from" competency proceedings, and contains specific provisions that govern when that time is excluded from the speedy trial calculus. First, the period until the court takes the motion under advisement – that is, the time taken for any psychological

examination, hearing, and post-hearing briefing – is excluded by section 3161(h)(1)(A). Then, once the proceeding is under advisement, section 3161(h)(1)(J) gives the court 30 days to decide the motion. That 30-day period can be extended by an "ends of justice" exclusion made pursuant to section 3161(h)(8).

If the court finds the defendant competent, the speedy trial clock resumes running. If the court finds the defendant incompetent, however, the defendant is, as noted, committed for treatment. In that case, section 3161(h)(4) excludes the period from the finding that the defendant is incompetent until the time his competency is restored.

The Government's reading would undermine this carefully organized statutory structure by retroactively applying the section 3161(h)(4) exclusion to the time before an incompetency finding has been made, including the periods already excluded by sections 3161(h)(1)(A) and 3161(h)(1)(J). The Government assumes without any support in the record that the "finding of incompetency" here "necessarily" encompassed the time before the finding was made (Gov. Br. 33), but this is not the case. In resolving the question of petitioner's competency, the court properly utilized evidence of his behavior dating back to before his arrest. J.A. 129-35. The court's finding, however, and indeed any finding under 18 U.S.C. § 4241(d), is prospective only. Otherwise, all the criminal proceedings that preceded the finding, which in this case covered four years and included petitioner's "waiver" of his speedy trial rights, could be considered void. The question in a section 4241 proceeding is explicitly whether the defendant "is presently" incompetent.[4] The consequences of the finding

[4] The court's finding, on March 21, 2001, was also phrased in the present tense – that Mr. Zedner "is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." J.A. 135.

are prospective only, and until the finding is made, the defendant's competency has only been called into question. The STA's exclusion for incompetency under section 3161(h)(4) is similarly forward-looking. Having excluded the time needed for any examination and hearing (section 3161(h)(1)(A)) and 30 days for a decision (section 3161(h)(1)(J)), the Act then excludes prospectively the period of delay "resulting from the fact that the defendant is mentally incompetent" (section 3161(h)(4)), a "fact" that does not exist until the incompetency finding is made. The Government may be correct that the Act "takes a defendant's incompetency as it finds it" (Gov. Br. 34), but a defendant is not incompetent until the court makes that finding.[5]

The Government's reading of section 3161(h)(4) would also permit unconscionable delays in the resolution of competency proceedings. According to the Government's view, there is no limit to how long a court may take to decide a competency proceeding as long as it eventually decides that the defendant is not competent. This would effectively repeal the operation of section 3161(h)(1)(J) in competency cases and permit the court to keep a proceeding under advisement indefinitely despite the clear statutory command to decide motions within 30 days. Permitting the court to neglect a motion for months or even years is hardly what Congress intended or the language of the Act permits. It is contrary not only to the Act's purpose of requiring expeditious proceedings but also to the purpose of 18 U.S.C. § 4241, which is to secure prompt treatment for the defendant so that he can return to competency.

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[5] The court also ruled in October 1998 that petitioner was incompetent, but that ruling became a nullity when it was vacated by the court of appeals because the district court deprived petitioner of his right to counsel at the competency hearing. *See United States v. Zedner*, 193 F.3d 562 (2d Cir. 1999) (per curiam).

The Government takes the cavalier attitude that an unlimited delay in determining the competency of a defendant such as Mr. Zedner, who was successfully treated in just three months, is "legally irrelevant" to the goal of expeditious proceedings. Gov. Br. 33. But every delay in deciding the motion results in that much delay in the start of treatment, and thus in the defendant's return to court. Accordingly, the Government's position is unsupportable. *See* Pet. Br. 13-14, 39 n.17.[6]

The Government's reading of section 3161(h)(4) is also pernicious because it leaves a defendant with no ability to rein in a lengthy delay in deciding a competency motion. A speedy trial motion made 30 days, 120 days, or even a year into this delay would properly be denied because, under the Government's view, until the outcome of the motion, the court could not yet know whether the delay was attributable to its failure to decide the motion or to the fact that the defendant is mentally incompetent. Again this makes no sense. The reason for the delay, a delay which occurs in its entirety before the motion is decided, does not turn on the substantive outcome of the motion, something that is entirely independent of the delay itself. In short, section 3161(h)(4) does not apply to a court's delay in deciding a competency motion because the court's failure to decide the motion in a timely fashion does not "result[] from the fact that the defendant is mentally incompetent* * * *" 18 U.S.C. § 3161(h)(4).

Lastly, the Government's reading will lull a judge who believes a finding of incompetency is the likely result of the proceeding into allowing too much time to elapse before making a decision. If the court then concludes

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[6] The Government claims that Mr. Zedner was in "no hurry" for a trial. Gov. Br. 34. But the actions the Government cites to support this claim, such as Mr. Zedner's appeal of the incompetency finding, all relate to his extended battle to establish that he was competent so that he could have a trial "as soon as possible." *Id.* 34-35.

instead that the defendant is competent, it will be compelled to dismiss the indictment because the 70-day limit will have already run. This twist is not only illogical, it will also bring undue pressure on the court to find the defendant incompetent in order to save the indictment. Surely, limiting the resolution of competency proceedings to the bright-line 30-day period permitted by section 3161(h)(1)(J) is the only result that is consistent with the statutory language, reading the relevant sections together. Thus, contrary to the Government's contention, the exclusion in section 3161(h)(4) is not triggered until the competency proceeding is concluded and the defendant has in fact been found incompetent. The exclusion does not apply to the earlier period when the defendant's competency, while subject to question, has not yet been determined. That period is governed by sections 3161(h)(1)(A) and 3161(h)(1)(J).

B. The Government mischaracterizes the district court's error.

Because the Government cannot prevail on its reading of section 3161(h)(4) in the face of the Act's clear command to decide competency motions within 30 days, it attempts to recast the error as the district court's failure to make a "finding" that the delay resulted from petitioner's incompetency. Gov. Br. 12-13, 35-37, 39-41. First, this description assumes a fact that is not true. Since Mr. Zedner had not yet been found incompetent, the delay in deciding the motion did not result from his incompetency (*see* pp. 13-17, *supra*), and the district court never suggested it did. In addition, petitioner has never advanced this claim. Petitioner has argued consistently both in the district court and on appeal that the error was the violation of the 70-day time limit by the court's unexcused failure to decide the competency proceeding for 195 days after it was taken

under advisement. J.A. 118; Pet. Second Circuit Br. 52-53.[7] Thus, the government's straw-man characterization of petitioner's argument is both factually and legally incorrect. Indeed, the Government seems to have devised it solely for the purpose of dismissing it out of hand. Gov. Br. 35.

The Government also appears to labor under the misimpression that petitioner is claiming that the Act was violated because he was not brought to trial during the time the competency proceeding was under advisement. *Id.* 31. This is not so. The error is that more than 70 unexcused days elapsed between indictment and trial. A violation of the Act does not turn on the date that a party is ready for trial, and unexcused delay often occurs before either party is ready. For instance, if the court adjourns a case at the first appearance for six months for no good reason, that time is not excludable even though neither party could actually have started trial on that day. Thus, the correct inquiry is whether unexcused delay occurred during the period the motion was under advisement, not whether the trial could have begun during that time.

C. The indictment must be dismissed.

The application of the Act to Mr. Zedner's case is simple. As the Government agrees, the competency proceeding was taken under advisement on August 23, 2000, when the final post-hearing memorandum was filed. The court then had 30 days to render a decision before the 70-day clock resumed ticking. 18 U.S.C. § 3161(h)(1)(J). Instead, the court let the case sit idle for the next 195 days, from August 23, 2000 to March 7, 2001, at which

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[7] The court of appeals, while less than accurate in describing petitioner's arguments, did recognize that this was the error asserted. J.A. 205 (recognizing argument on Zedner's behalf that section 3161(h)(4) did not apply because "the delay did not *result from* the fact that he was incompetent") (emphasis in original).

time petitioner moved to dismiss the indictment on speedy trial grounds. At that point 165 days of unexcused delay had elapsed in deciding the motion beyond the 30 days permitted by section 3161(h)(1)(J). This 165-day delay, by itself, violated the Act because it exceeded the 70 days of unexcused delay between indictment and trial that the Act permits. 18 U.S.C. § 3161(c)(1). In addition, for the reasons stated in petitioner's opening brief (Pet. Br. 16-18, 33-43), and not disputed by the Government (Gov. Br. 36-38, 40 nn.12-13), this error cannot be considered harmless. Accordingly, pursuant to the Act, the indictment "shall be dismissed," with or without prejudice. 18 U.S.C. § 3162(a)(2).[8]

[8] In his opening brief, petitioner asked the Court to hold that the violation of the Act cannot be harmless and then remand to the court of appeals to decide whether the Act had been violated, a question that court left unresolved. Pet. Br. 44; *see* J.A. 205. If, however, the Court now accepts the Government's invitation to decide whether the 70-day limit was violated, and rules in petitioner's favor, then, contrary to the Government's position (Gov. Br. 41-42), the remedy should be to remand to the court of appeals with instructions to dismiss the indictment either with or without prejudice. *See* 18 U.S.C. § 3162(a)(2).

CONCLUSION

The Court should reverse the judgment below and remand for dismissal of the indictment with or without prejudice. In the alternative, the Court should remand for a determination of whether the Speedy Trial Act's 70-day time limit was exceeded based upon the delay from August 23, 2000 to March 6, 2001.

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Respectfully submitted,

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